LEE AH LAN

v.

LEE KIM LAN CONSTRUCTION INDUSTRIES SDN BHD & ANOR (NO 3)

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[CIVIL SUIT NO: 22-107-1996]
21 APRIL 2003

CIVIL PROCEDURE: *Action - Commencement - Notice to co-defendant - Leave of court - Defendant claiming against co-defendant for relief relating to original subject matter and substantially the same relief as claimed by plaintiff - Whether needing leave to file notice thereof - Rules of the High Court 1980 O. 16 r. 8(1), 8(2), 8(3)*

This was an application by the second defendant for leave to issue a notice to the first defendant pursuant to O. 16 r. 8(1) Rules of the High Court 1980 ('RHC') claiming for relief that were substantially the same relief as sought for by the plaintiff therein.

The facts were that the first and the second defendants were co-owners of a piece of land in Selangor ('the land') with the first defendant holding 169/180 undivided share thereof. The first defendant had sought to develop the land and intended to subdivide the land into 38 lots. By a sale and purchase agreement dated 15 February 1983, the plaintiff purchased four of the lots ('the sub lots') and remitted the payment to the first defendant. The sale notwithstanding, the first defendant did not apply for any subdivision of the land as he ought to, and continued to enjoy the use of the sub lots. Aggrieved, the plaintiff sued the first defendant for various injunctive and declaratory relief. Thereafter, the first defendant applied for and obtained an order to include the second defendant as a co-defendant to the suit. The second defendant, however, had all along been labouring under the impression that she was merely a witness in the suit, and it was not until the hearing had come to the penultimate stage that she discovered that she was a co-defendant, and not a witness. Having since appointed a new solicitor, the second defendant had successfully applied to amend her defence, and subsequent thereto, applied for leave under O. 16 r. 8(1) RHC herein. Before the learned judge the second defendant *inter alia* argued that leave ought to be granted as the commencement of a separate proceeding would lead to additional costs and multiplicity of proceedings.

Held (ruling that notice could be issued without leave of court):

[1] Order 16 r. 8(1) RHC, in particular para (b) thereof, contains a statutory expression of the rule which was to the effect that while leave of the court is required to issue such a notice to a person who is not already a party to the action, such a rule does not apply to a person who is already a party. That being so, the second defendant is at liberty to issue and serve on the first defendant the notice as specifically particularised herein, without leave of the court because the first defendant is already a party to the suit. (p 234 d-e)

[1a] It is however pertinent to observe that O. 16 r. 8(1) is made subject to O. 16. r. 8(2). Bearing in mind the wording of O. 16 r. 8(2), it seems clear that O. 16 r. 8(1) would cease to apply where a defendant brings a counterclaim against a co-defendant. In the instant case, the second defendant is not bringing a counterclaim against the first defendant. It follows therefore that under O. 16 r. 8(1)(b), the second defendant is entitled to issue and serve the said notice, without leave, on the first defendant. (p 234 f-h)

[2] The manifest purpose of O. 16 r. 8(1) is to avoid multiplicity of proceedings as the second defendant's claim against the first defendant is for a relief relating to or connected with the original subject matter that coincides with the plaintiff's claim for relief or remedy against the second defendant and both the claims are substantially the same. (p 235 c-d)

[3] Bearing in mind O. 16 r. 8(3), it shall not be necessary for the first defendant to file an appearance after the service by the second defendant of the said notice on them. The first defendant is at liberty to plead in direct response to the said notice, within 14 days from the date of such service. (p 236 b)

Case(s) referred to:
Burford Burford v. Clifford [1932] 2 Ch D 122 ***(refd)***
Ewe Koek Neoh v. Ooi Soon Tin & Ors [1926] 2 MC 107 ***(refd)***
GP De Silva & Ors v. Chua Yam Thong [1962] 28 MLJ 236 ***(refd)***
Myers v. N & J Sherick Ltd & Ors [1974] 1 All ER 81 ***(refd)***
Tan See Yin Vincent v. Noone & Co & Anor [1995] 2 CLJ 195 SC ***(refd)***
Towse v. Loveridge [1883] 25 Ch D 76 ***(refd)***
Standard Securities, Ltd v. Hubbard & Another [1967] 2 All ER 622 ***(refd)***

Legislation referred to:
Land Code (Cap 138), s. 44(1)
National Land Code 1965, ss. 342, 343(1)(b)
Rules of the High Court 1980, O. 16 rr. 8(1)(b), (2), (3)

For the 1st defendant - S Letchumanan; M/s Letchu Suppiah & Co
For the 2nd defendant - Liza Chan; M/s Liza Chan & Co

Reported by Rusnah Aziz

JUDGMENT

Low Hop Bing J:

Application

Pursuant to O. 16 r. 8(1)(b) of the Rules of the High Court 1980, the 2nd defendant's application in encl. (108) seeks to obtain leave of the court to issue a notice to the first defendant claiming for a relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff.

Background

For purposes of completeness, it is necessary to state the background leading to this application.

In the instant suit, the plaintiff's claim against the first defendant is premised on the fact that there had been an agreement between the plaintiff and the first defendant on 15 February 1983 ("the sale and purchase agreement") whereby the first defendant, as co-owner of 169/180 undivided share of the land held under C.T. No. 10075 Lot No. 31, Section 11, Bandar Kajang Daerah Ulu Langat ("the land") had agreed to sell and the plaintiff had agreed to purchase four lots temporarily marked as sub-lots 2, 3, 13 and 14 on the land ("the sub lots").

The plaintiff alleged that the first defendant was supposed to subdivide the land into thirty eight lots. The plaintiff further alleged that the plaintiff had remitted the payment for the sub lots to the first defendant but there has been no application by the first defendant for the subdivision of the land and the first defendant had continued to enjoy the use of sub lots 13 and 14 for its own benefit and purposes. The plaintiff also alleged that the first defendant had prevented the plaintiff from enjoying the use of sub lots 2 and 3. As a result of this, the plaintiff claimed against the first defendant, *inter alia*, as follows:

(a) a declaration that the plaintiff is a beneficial owner of the sub lots pursuant to the sale and purchase agreement;

(b) an order that within fourteen days the first defendant or the second defendant take steps to apply to the State Authority in writing for the change of conditions or use of the land and subdivision of the land for individual titles to be issued to enable the plaintiff to be registered as owner of the sub lots.

(c) an order that should the first or second defendant fail to take any steps within fourteen days to apply to the State Authority in writing for the change of conditions or use of the land and subdivision of the land for individual titles to be issued to enable the plaintiff to be registered as owner of the sub lots, the plaintiff is to be granted leave to make a direct application to the State Authority for the change of conditions or use of the land and subdivision of the land for individual titles to be issued and the first and second defendants, upon the request of the plaintiff, will immediately forward all documents which would be necessary for the plaintiff to make the direct application;

(d) a mandatory injunction against the first defendant, its employees or agents to immediately move or shift construction materials, concrete and wooden planks that were left at the main entrance and the road in front of sub lot 2 and a part of the road beside sub lot 3, failing which the plaintiff is allowed to remove or shift the construction materials, concrete and wooden planks wherein the costs to do the same would be borne by the first defendant;

(e) a prohibitory injunction restraining the first defendant, its employees or agents from, taking any action in any manner whatsoever to prevent the plaintiff from enjoying the peaceful use of the sub lots of which the plaintiff is the beneficial owner;

(f) an order that the plaintiff be at liberty to claim from the first defendant any rental collected by or paid to the first defendant since 1983 by the tenants who are unknown to the plaintiff for sub-lots 13 and 14; and

(g) interest at the rate of 8% per annum on the rental that has not been paid since1983 from the date of the writ until full and final settlement.

Subsequent to the plaintiff's claim, the first defendant had, *vide* application in encl. (54) dated 27 November 1996, applied to have the second defendant included as a defendant to this suit on the ground that the second defendant is a co-owner of 11/180 undivided share of the land. Enclsure (54) was allowed and Yap Fan was added as the second defendant herein.

The hearing of this suit has now reached the stage at which the first defendant has called three witnesses with one more witness to go. The second defendant is a 70-year old individual who was labouring under a false assumption that she was merely a witness in this action. Therefore, she attended court at the request of her then solicitors M/s Gunaretnam & Co, believing that her presence was required as a witness and this belief was compounded by the fact that each time she attended court, she was paid a sum of RM50 to RM100 by one Chen Yoke Kian.

Documents were allegedly signed by the second defendant without the contents being explained to the second defendant by her then solicitors. In June 2001, the second defendant's daughter happened to have read one of the letters that were sent by the second defendant's then solicitors and the second defendant was told that the second defendant was actually a defendant to this suit. Upon making this discovery, the second defendant requested for a set of the pleadings from her then solicitors who forwarded the same to her. She then discovered that defence and counterclaim had been filed on her behalf.

Subsequently, the second defendant appointed the present solicitors. Upon the present solicitor's advice, she made an application to amend her defence and counterclaim to reflect the true and accurate position in this suit *vide* encl. (110).

At the hearing of the application to amend, I heard the oral testimonies of three witnesses viz the second defendant's then solicitor, Mr Manian Raju, the second defendant and one Indran V Kumaraguru. My finding is that to some extent, there seems to be some communication gap between the second defendant, and her then solicitor pertaining to the facts of the case which form the basis of the instructions to be included in the second defendant's pleadings. I allowed the application to amend her defence and to withdraw her counterclaim.

The above background substantially constitutes the grounds for the second defendant's application.

Objection By First defendant

En S Letchumanan, learned counsel for the first defendant, objected to the second defendant's application on the following grounds:

1. The application is baseless, vague and an afterthought and has jeopardised the first defendant's defence to the plaintiff's claim;

2. The plaintiff has closed its case at the trial of this suit and the second defendant could commence a separate suit;

3. The first defendant was not aware of the sale and purchase agreement nor the proposal to partition and subdivide the land;

4. The second defendant can commence an action for any of the relief under the Kanun Aturcara Negara (sic);

5. Both defendants are co-owners who had reached an understanding that no claim can be made against the first defendant;

6. The second defendant, her agents or servants have used the land and so the first defendant is not responsible to account for rental; and

7. The second defendant should not meddle with this suit as it is almost at the end of the trial.

Submission For Second Defendant

The second defendant's learned counsel, Cik Liza Chan, in response submitted that the aforesaid objections are without merits as the court at this stage of the application is not concerned with the merits.

She said that the first defendant is entitled to plead to the second defendant's claim for relief. She added that there was no such thing as Kanun Aturcara Negara.

She stressed that the commencement of a separate proceeding would lead to additional costs and multiplicity of proceedings.

Decision Of The Court

Misnomer

The reliance by the first defendant's learned counsel on a non-existent Kanun Aturcara Negara is more of a misnomer caused by a typographical slip than the ignorance of the first defendant's learned counsel. The learned counsel's own careful editing of his written submission would have avoided the resultant embarrassment. Be that as it may, I am prepared to treat it as Kanun Tanah Negara (ie, the National Land Code 1965) as being the relevant law governing the process of partitioning and subdivision.

No Leave Required Under O. 16 r. 8(1)

Order 16 r. 8(1) pursuant to which the application is made is reproduced as follows:

8. (1) Where in any action a defendant who has entered an appearance:

(a) claims against a person who is already a party to the action any contribution or indemnity; or

(b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or

(c) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and himself but also as between either or both of them and some other person who is already a party to the action;

then, subject to paragraph (2), the defendant may, without leave, issue and serve on that person a notice containing a statement of the nature and grounds of his claim or, as the case may be, of the question or issue required to be determined.

Upon a proper perusal of the entire provisions of O. 16 r. 8(1), in particular para (b) above, there can be no doubt that the second defendant is at liberty to issue and serve on the first defendant the notice as specifically particularised above, without leave of the court because the first defendant is already a party to the suit herein.

Order 16 r. 8(1), in particular para (b) above, contains a statutory expression of the rule which was stated by Pearson, J in *Towse v. Loveridge* [1883] 25 Ch D 76 to the effect that while leave of the court is required to issue such a notice to a person who is not already a party to the action, such a rule does not apply to a person who is already a party.

It is pertinent to observe that O. 16 r 8(1) is made subject to O. 16 r. 8(2) which reads:

(2) Where a defendant makes such a claim as is mentioned in paragraph (1) and that claim could be made by him by counterclaim in the action, paragraph (1) shall not apply in relation to the claim.

Hence, it seems clear to me that O. 16 r. 8(1) would cease to apply where a defendant brings a counterclaim against a co-defendant: *Tan See Yin Vincent v. Noone & Co & Anor* [1995] 2 CLJ 195 SC.

In the instant case, since the second defendant is not bringing a counterclaim against the first defendant, I hold that under O. 16 r. 8(1)(b), the second defendant is entitled to issue and serve the said notice, without leave, on the first defendant.

Similar Relief

As both the learned counsel have proceeded to argue vigorously on the basis that leave is required, I shall consider their submissions on this premise.

The aforesaid background to this application shows that the plaintiff and the second defendant are claiming a strikingly and substantially similar relief against the first defendant in relation to the land. That being the case, the issue by the second defendant of the said notice is eminently suitable as it would avoid multiplicity of proceedings: In *re Burford. Burford v. Clifford* [1932] 2 Ch D 122; which was applied in *Myers v. N & J Sherick Ltd & Ors* [1974] 1 All ER 81. See also *Ewe Koek Neoh v. Ooi Soon Tin & Ors* [1926] 2 MC 107.

The court must not allow multiplicity of proceedings and ought to settle the disputes between parties to an action so that the same or substantially the same question would not be tried twice with possibly different results: per Pennycuick J in *Standard Securities, Ltd v. Hubbard & Another* [1967] 2 All ER 622.

In my view, the manifest purpose of O. 16 r. 8(1) is to avoid multiplicity of proceedings as the second defendant's claim against the first defendant is for a relief or remedy relating to or connected with the original subject matter and that coincides with plaintiffs claim for relief or remedy against the second defendant and both these claims are substantially the same.

Co-Proprietorship Of Land

It seems to be undisputed that the plaintiff, first defendant and second defendant are allegedly co-proprietors of the land. The law on co-proprietorship of land has been clearly explained by Suffian J (later LP) in *GP De Silva & Ors v. Chua Yam Thong* [1962] 28 MLJ 236 at p. 237 G left as follows:

> ... the co-proprietor are entitled to the land in undivided shares in the proportions specified on the register. As land includes "things attached to the earth", section 2, this means that they are also entitled to the fruits of the houses built by the defendant, in undivided shares in the proportions specified in the register.

Although the learned judge was referring to the then s. 44(1) of the Land Code Cap. 138, the same is true of the law as contained in ss. 342 and 343 of the National Land Code 1965, expecially s. 343(1)(b) which expressly provides that "so long as their co-proprietorship continues, they shall be entitled to possession and enjoyment of the whole".

Conclusion

On the foregoing grounds, I make an order in terms of this application.

Further Directions

Order 16 r. 8(3) reads as follows:

> (3) No appearance to such a notice shall be necessary if the person on whom it is served has entered an appearance in the action or is a plaintiff therein, and the same procedure shall be adopted for the determination

between the defendant by whom, and the person on whom, such a notice is served of the claim, question or issue stated in the notice as would be appropriate under this Order if the person served with the notice were a third party and (where he has entered an appearance in the action or is a plaintiff) had entered an appearance to the notice.

In line with O. 16 r. 8(3), I direct that after the service by the second defendant of the said notice on the first defendant, it shall not be necessary for the first defendant to file an appearance but the first defendant is at liberty to plead in direct response to the said notice, within 14 days from the date of such service.

I further order that the first defendant and all parties herein be entitled to call new witnesses or recall any of their witnesses as they may consider necessary and advisable.